STATE OF MICHIGAN
IN THE SUPREME COURT

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2016 PA 249
_____/

Supreme Court No. 154085

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

RESPONSE BRIEF OF ATTORNEY GENERAL BILL SCHUETTE IN SUPPORT OF THE VALIDITY OF 2016 PA 249

ORAL ARGUMENT REQUESTED

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RESPONSE ARGUMENT

I. The Court should issue an advisory opinion to resolve this important question of law that will soon affect thousands of Michigan families.

The fact that nine amicus briefs have been filed in this case—by entities including the Michigan Education Association, the Michigan Association of Non-Public Schools, the Michigan Catholic Conference, the ACLU, and members of the House and Senate—highlights the importance this advisory-opinion request has for the people of Michigan. Indeed, the opposition brief makes no effort to minimize the importance of resolving whether § 152b is constitutional. (See AG Br in Opp, pp 1, 6–10.)

Instead, the opposition brief argues (1) that this case is ill-suited for an advisory opinion because "it is possible that this Court would have to determine whether to overrule some of the analysis in *Traverse City*" and (2) that the advisory opinion process would "not achieve its purpose" because in that scenario the lower courts would not know whether to follow the *Traverse City* or this Court's advisory opinion. (AG Br in Opp, pp 1, 10 (referring to *Traverse City Sch Dist v Attorney General*, 384 Mich 390 (1971)).) That argument fails for a number of reasons.

First, this Court will have no need to overturn *Traverse City*. As explained in the Attorney General's brief in support of § 152b, that case correctly recognized that the plain text of article 8, § 2 of Michigan's Constitution limits aid to the instructional components of nonpublic schools, not aid directed at the health, safety, and general welfare components of all schools. (See AG Br in Support, pp 8–20.) In fact, overturning *Traverse City* would not be necessary even if this Court were to

accept the *opposition brief's* primary argument. (AG Br in Opp, p 22 ("This Court does not need to overrule *Traverse City* to hold Public Act 249 unconstitutional . . . .").) Perhaps that is why none of the amici on the opposition side expressly call for this Court to overrule *Traverse City*. Thus, overturning *Traverse City* would be a consideration only in the remote circumstance that this Court were to reject the primary arguments of the pro-constitutionality brief, of the opposition brief, *and* of the amici.

Second, issuing an advisory opinion would resolve the constitutionality of § 152b as a practical matter, because the State, having asked this Court for its opinion on precisely that issue, would follow this Court's decision. The advisory opinion would accomplish exactly what it is supposed to: it would resolve the constitutionality of this legislation.

Third, even if the suggested "paradox" were somehow to arise, the opposition brief itself suggests that confusion would not result in the lower courts if this Court were to issue an advisory opinion that overruled *Traverse City*. In the "only" case in which an advisory opinion "purported to overrule a prior precedent," the lower courts responded by following the advisory opinion: the decision "that was overruled has not been cited in Michigan since." (AG Br in Opp, p 10 (referring to *Kelley v Secretary of State*, 149 Mich 343 (1907)).)

The opposition brief also argues that further factual development is needed so that this Court will not need to guess about the true nature and costs of the reimbursements. (AG Br in Opp 11.) But advisory-opinion requests inherently

involve facial challenges to legislation; here, for example, the opposition argues that *no* amount of money, no matter how little, can be reimbursed. E.g., Michigan Education Association et al Amicus Brief, p 20 (arguing § 152b is "unconstitutional on its face"). In this facial-challenge context, the precise reimbursement amounts are beside the point, because those opposing § 152b's constitutionality must establish that it cannot be applied constitutionally in *any* set of circumstances: "To prevail, plaintiffs must establish that no set of circumstances exists under which the [ordinance] would be valid," and "[t]he fact that the . . . [ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Bonner v City of Brighton*, 495 Mich 209, 223 (2014) (internal quotation marks and footnotes omitted; alterations in original); accord *United States v Salerno*, 481 US 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). In short, this Court does not need further facts to resolve the pure question of law before it.

Further, as already explained in the pro-constitutionality brief (at 23–25), the State has already developed mechanisms for public schools to use for reporting, in an itemized way, exactly what money goes to the cost of "instruction" versus what money goes to other items like "school administration." MCL 388.1618(5). The fact that public schools are already doing this demonstrates that a similar mechanism can be used for nonpublic schools and so resolves any suggestions that it might be

too difficult to separate out the non-instructional measures that may be reimbursed from the instructional ones that may not. And § 152b allows for reimbursement only of actual costs incurred, not anticipated or hypothetical costs. MCL 388.1752b(1), (3), & (4).

In light of the importance of this issue, this Court should issue an advisory opinion to resolve the facial validity of § 152b and to provide clarity and certainty to the hundreds of thousands of affected Michiganders.

II. Section 152b does not violate article 8, § 2 of Michigan's Constitution because § 152b provides funding for general health and safety measures, not for instruction.

Neither the opposition brief nor its supporting amici grapple with the key focus of § 2, as expressed in its use of the key words "school," "student," "pupil," and "instruction"—that schools exist to educate and instruct children. See *Webster's New International Dictionary* (2d ed 1955) (defining "school" as "an institution for teaching children"). Yet this function of schools is the very feature that explains why they are addressed in the Constitution in the first place. Const 1963, art 8, § 1 ("Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.") & § 2 ("The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.").

Consider, for example, the difference between a school and a community recreation center. The former is addressed by the Constitution, while the latter is not. Both a school and a recreation center might have playground equipment,

might have to comply with safety measures in building codes, might require criminal background checks for staff working with children, might require the posting of material safety data sheets for employees, and might serve food that must satisfy health regulations. But if the Legislature decided to provide limited public funding to a private recreation center, it is hard to imagine (setting aside whatever other objections might arise) that opponents would argue that providing funds to a nonpublic recreational center violates § 2. Why not? Because a school exists to provide instruction and education, while a recreation center, regardless of the other worthy goals it might support, does not. That is part of the common understanding of what a school is. Indeed, one need look no further than the amici briefs by educational institutions in this case—regardless of side—to confirm this point. (E.g., Michigan Association of School Boards et al Amicus Br, p 19 ("the most basic function of any school" is "educating its students").)

That understanding has not changed since § 2 became part of our Constitution. And because the text of § 2 itself reveals this focus on instruction and education, it does not violate § 2 to provide funding that relates, for example, to playground equipment at a nonpublic school any more than it would violate § 2 to provide funding that relates to playground equipment at a nonpublic recreation center. *Traverse City Sch Dist*, 384 Mich at 419 (holding that "[t]he prohibitions of Proposal C have no impact on auxiliary services," i.e., on services that functionally were "general health and safety measures"); see also, e.g., *id.* at 421 ("Since the

employment stricture is part of the educational article of the constitution, we construe it to mean employment for educational purposes only.").

Rather than focusing on the language in § 2, as this Court correctly did in *Traverse City*, and recognizing that § 2 extends only to funds used for instruction, the opposition brief and opposing amici offer different limitations that they would insert into § 2.

At the outset, the reason they insert limitations is probably because they, like the brief in support (AG Br in Supp, pp 10–11), understand that reading § 2's language broadly would mean that *almost any* public funding could be viewed as at least indirectly aiding nonpublic schools. The opposition brief, for example, concedes that "general fire, police, water, electricity, sewage, and other community services" are not barred by § 2. (AG Br in Opp, p 29.) The opposition brief reaches the right outcome on that point, but its analysis does not flow from § 2's text. The opposition brief argues that public services provided "to aid *the community at large* [ ] are not, in any ordinary sense, 'directly or indirectly to aid any . . . *nonpublic* . . . *school*' or any other singular place of business." (*Id.* (emphasis and ellipses in original).) Yet the fact that aid to a nonpublic school would *also* aid the community at large is beside the point under § 2's plain text; the text does not include any exception for aid that also benefits others or the community at large. And contrary to the opposition brief's contention, the ordinary sense of the words used in § 2 would cover these types of services. For example, it fits perfectly with ordinary English to acknowledge this simple fact: it would directly aid a nonpublic school if

firefighters put out a fire on the nonpublic school's property. In short, the community-at-large distinction is not a textually grounded limitation on § 2's expansive text—unlike the limitation that "aid" means help that supports education and instruction.

The other proposed limitations fare no better. The opposition brief argues that § 152b fails the "control" requirement articulated in *Traverse City*. (AG Br in Opp, pp 2, 12, 14–17.) But this Court focused on control in its evaluation of shared-time services, which were instructional in nature, *not* in its discussion of auxiliary services, which are not. Of the 15 times the word "control" appears in *Traverse City*, 12 of its uses are in parts of the opinion discussing shared time, 384 Mich at 413–416 (Part III of the opinion, which addressed shared time), 435 (summary conclusions), while only a single use of the word relates to auxiliary services, *id.* at 420. (The two other appearances of the word "control" were (1) quoting a statute about drivers training, *id.* at 419, and (2) stating that federal money does not become public money even if it is "under the administrative control of public school boards," *id.* at 423.) And in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, this Court linked the concept of control only to the shared-time issue: "shared time programs—if properly controlled by the public school system—and auxiliary services such as health care and remedial reading programs could be provided to private schools consonant with the mandate of Proposal C." 394 Mich. 41, 48 (1975) (footnote omitted; emphasis added). Moreover, while this Court did note in *Traverse City* that private schools exercise "no control" over auxiliary services, this Court

supported that conclusion with the fact that the auxiliary services were "given to private school children *by statutory direction*, not by an administrative order from a private school." 384 Mich at 420 (emphasis added). Here too the auxiliary services are given by statutory direction, and that means they *are* under public control. They are under public control even where the State, for efficiency and cost reasons, allows the private school to facilitate a particular function, such as inspecting or reporting, that a public employee would otherwise do. If, for example, a private school must comply with a mandate about fire and tornado drills to satisfy the requirements of state law and so to remain open, how can it be said that the private school *controls* fire and tornado drills in any sense relevant to § 2?

In the end, perhaps the primary objection of the opposition brief and its amici is that reimbursing nonpublic schools will "directly fund" nonpublic schools. (AG Br in Opp, p 2; see also, e.g., ACLU Amicus Br, p 9 (arguing that § 152b "functions as a direct appropriation" to nonpublic schools).) But this objection loses sight of the fact that it is the *instructional* function of schools, not their health, safety, or administrative functions, that cannot be directly funded without offending § 2. Nothing suggests that the people added § 2 to Michigan's Constitution because they did not want public funding to go to ensuring safe playground equipment at a nonpublic school, or to confirming compliance with requirements concerning asbestos safety, or even to ensuring that teachers meet basic certification requirements. Rather, the available history suggests that they passed § 2 because of concerns about paying for the instruction at nonpublic (and mostly religious)

schools. (See, e.g., Michigan Association of School Boards Amicus Br, pp 27–28 (explaining that § 2 was passed in response to bills that "did not fund such auxiliary services, but instead *funded the very functions of parochial schools*," and that "the People of the State of Michigan *did not disfavor auxiliary aid*") (emphasis added)); *Traverse City*, 384 Mich at 406 n 2 (discussing the steps leading up to the enactment of parochiaid and concern over tuition vouchers, and noting that "parochiaid generated heated controversy both inside and outside the legislature").

The point that "money is fungible," such that there is no difference between funding a safety measure and funding actual instruction (ACLU Amicus Br, p 16; see also Michigan Education Association Amicus Br, pp 25–26), does not undermine this point. Under that reasoning, it would also provide a benefit for a nonpublic school if the Legislature were to remove a mandate; if, for example, the Legislature were to repeal the mandate that nonpublic schools use pesticides properly, Mich Admin Code, R 285.637.15, the removal of that state-imposed burden would reduce an expense previously incurred by the nonpublic schools, and so would (under the money-is-fungible point) provide additional funds to nonpublic schools. Under this reasoning, § 2 would forbid the State from removing any burden it has ever imposed on a nonpublic school.

Fortunately, that is not the law. For example, it does not violate the Establishment Clause to provide a church with a non-profit tax exemption, *Walz v Tax Comm of City of New York*, 397 US 664 (1970), even though that money could be seen, from a purely economic perspective focused on fungibility, as providing

monetary aid to a church. See also *Comm for Pub Ed & Religious Liberty v Regan*, 444 U.S. 646, 658 (1980) ("The Court 'has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.' "), quoting *Hunt v McNair*, 413 U.S. 734, 743 (1973). Similarly, this Court already explained in *Traverse City* that even employing policemen or firemen at a nonpublic school would not violate § 2 (although that would also be a direct appropriation), which shows that this Court agreed that even direct funding is permissible so long as it goes to *non-instructional* services. 384 Mich at 420 (concluding that § 2 did not prohibit "the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities.").

While the ACLU's "money is fungible" theory itself has no limiting principle, the ACLU argues that § 152b has "no prospective limiting principle" as a funding mechanism for nonpublic schools. (ACLU Amicus Br, p 11.) That is not accurate. Section 152b expressly limits its coverage, consistent with § 2 itself, to mandates that are "noninstructional in character." MCL 388.1752b(7). That means, as explained in the pro-constitutionality brief (at 22), that the reimbursements allowable under the plain language of § 152b, including the one relating to a government class, MCL 380.1166, will not cover the costs of instruction, as some of the opposing amici assert. (E.g., ACLU Amicus Br, p 15 (alleging that reimbursements will cover "costs of instruction"); Michigan Association of School Boards Amicus Br, p 29 (alleging that § 152b allows "payment to nonpublic school

teachers for instruction in secular subjects").) Rather, § 152b will extend only to administrative costs. In short, the three controlling legal sources here—§ 2 of article 8, § 152b, and *Traverse City*—supply the proper limiting principle.

Another limiting principle set out in § 152b refutes the warning of the Michigan Association of School Boards that § 152b will cover the wages of employees erecting a school building. (MASB Amicus Br, p 20.) The relevant mandate, found in MCL 388.851, simply sets out construction requirements, such as that "[a]ll walls, floors, partitions, and roofs shall be constructed of fire-resisting materials." MCL 388.851(1)(b). Thus, the costs associated with this mandate are compliance measures, such as completing the inspections that must be conducted under this statute. See MCL 388.581(1)(h); MCL 388.581b(1) & (3) (addressing the state construction code and "inspections of school buildings"). As to the limiting principle, reading § 152b as authorizing payment for building construction would ignore its limitation that it authorizes only funds that are "incidental to the operation of a nonpublic school." MCL 388.1752b(7).

A few last points warrant brief responses.

The ACLU asserts that *Traverse City* has caused "substantial confusion" (ACLU Amicus Br, p 2, 11), but it provides no evidence of that assertion—not even a single case citation showing, for example, confusion in the lower courts as to how to apply *Traverse City*. Indeed, under principles of stare decisis the absence of such confusion shows that this Court should remain faithful to *Traverse City*, which has worked well for four and a half decades. (See AG Br in Supp, pp 28–29.)

The opposition brief argues that there is no reason to treat nonpublic schools differently from other businesses. (AG Br in Opp, p 28.) But there are many reasons. Schools, even nonpublic ones, are inherently different from businesses. Michigan's Constitution expressly recognizes the importance of schools and education, Const 1963, art 8, § 1, and imposes a duty on the State to maintain public schools, Const 1963, art 8, § 2. Michigan law also makes school attendance compulsory. MCL 380.1561. As a result, the State requires an especially vulnerable set of citizens (schoolchildren) to attend schools—not any other nonprofits or businesses. That requirement further amplifies the State's keen interest in their health and safety. And the U.S. Constitution requires parents to be given the choice to send their children to nonpublic schools. *Pierce v Society of Sisters*, 268 US 510 (1925). None of those features apply to ordinary businesses. Given all of these differences, and vulnerability of children, the State has good cause to alleviate the financial burdens of its important but extensive regulations to ensure that *all* schools comply with them.

Finally, the Michigan Education Association argues that the absence of legislative history must count against § 152b and lessen the amount of deference owed to the Legislature. (MEA Amicus Br, p 20.) But legislative history is irrelevant when the text is, as here, clear, and treating a statute with less respect because of a shortage of legislative history conflicts with the basic premise that legislation is presumed to be constitutional. E.g., *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116 (2003) ("[W]e do not resort to

legislative history to cloud a statutory text that is clear.") (internal quotation marks omitted); *Phillips v Mirac*, 470 Mich 415, 422 (2004) ("Statutes are presumed constitutional.").

CONCLUSION AND RELIEF REQUESTED

The Legislature has passed numerous laws designed to provide a safe and healthy environment for all school children in Michigan, laws that are consistent with the Legislature's constitutionally assigned task of providing for "the protection and promotion of the public health" and of the "general welfare of the people." Const 1963, art 4, § 51. Having imposed costly mandates on nonpublic schools for this public purpose, the Legislature's small step here to lighten that state-imposed cost is not unconstitutional, because none of the mandates go to the actual costs of instruction.

For these reasons, the Court should grant the Governor's request for an advisory opinion and should rule that § 152b does not violate article 8, § 2 of Michigan's Constitution.

Respectfully submitted,

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